IN THE SUPREME COURT

OF THE

UNITED STATES.

HENRY BOLLN,
Plaintiff in Error.

v.

THE STATE OF NEBRASKA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

1. Henry Bolln, Plaintiff in error, was elected Treasurer of the city of Omaha for two terms. During his second term, in 1896, it was discovered that he was a defaulter. He was tried and convicted in the District Court of Douglas county of embezzling $105,000.00 of the public money. A sentence of nineteen years in the State Penitentiary and a fine of $210,000.00 were imposed upon him. In due time his

case was brought to the Supreme Court of the state by proceedings in error, where the judgment of the lower court was affirmed.

2. Section 124 of the Criminal Code of the State of Nebraska provides, *inter alia*, that:

"If any officer or other person charged with the collection, receipt, safe keeping, transfer, or disbursement of the public money, or any part thereof, belonging to the state, or to any county, or precinct, organized city or village, or school district in this state, shall convert to his own use, or to the use of any other person or persons, body-corporate, association or party whatever, in any way whatever, * * * * * every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall thus be converted, used, invested, loaned or paid out as aforesaid, which is hereby declared to be a high crime, and such officer or person or persons shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years, according to the magnitude of the embezzlement, and also pay a fine equal to double the amount of money or other property so embezzled as aforesaid." etc.

Section 286 of the same Code reads thus:

"Whenever a complaint in writing and upon oath, signed by the complainant, shall be filed with the magistrate, charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest of the person accused, if he shall have reasonable grounds to believe that the offense charged has been committed."

A complaint was filed in due form before the proper magistrate, charging Bolln with embezzlement, under the provisions of Section 124, *Supra*, and a warrant was issued thereon for his apprehension.

Section 294 of the same Code is as follows:

"Whenever any person has been arrested under a warrant as provided in the preceding sections of this chapter, it shall be the duty of the officer making the arrest to take the person so arrested before the proper magistrate; and the warrant by virtue of which the arrest was made, with the proper return endorsed thereon and signed by the officer, shall be delivered to such magistrate."

Bolln was arrested and brought before the proper magistrate.

Section 297. The following are sections of the same Code:

"When it shall become necessary to adjourn any trial according to the provisions of the preceding section, the person accused may enter into a recognizance before the magistrate, with good and sufficient security to be approved by the magistrate, in such amount as he shall deem reasonable, conditioned for the appearance of such person before said magistrate, at a place and day and hour in said recognizance specified; *Provided*, That such adjournment shall not be for a longer time then twenty days without the consent of the accused; *And provided*, That no person shall be let to bail who is charged with an offense not bailable under the constitution of this state."

Section 300.

"When the complaint is for a felony, or for an offense for which the fine can exceed one hundred dollars, or the imprisonment can exceed three months, upon the accused being brought before the magistrate he shall proceed as soon as may be, in presence of the accused, to inquire into the complaint."

Section 302.

"If, upon the whole examination, it appears that there has been no offense committed, or that there is not a probably cause for holding the prisoner to answer the offense, he shall be discharged."

Section 306.

"It shall be the duty of every magistrate in criminal proceedings to keep a docket thereof as in civil cases. All recognizances taken under this title, together with a transcript of the proceedings, where the defendant is held to answer, shall be certified and returned forthwith to the clerk of the court at which the prisoner is to appear. The transcript shall contain an accurate bill of all the costs that have accrued, and the items composing the same."

Section 307.

"If the offense for which the prisoner is held to answer be bailable, and the prisoner offer sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable on the first day of the next term thereof, and not to depart such court without leave, and thereupon he shall be discharged."

Section 578.

"That the several courts of this state shall possess and shall exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of like prosecutions upon indictments."

Section 579.

"All informations shall be filed during term, in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise prescribe, he shall endorse thereon the names of such other witnesses as shall be then known to him."

Section 581.

"That the provisions of chapters XL, XLI, XLII, XLIII, XLIV, XLV, of the Criminal Code, in relation to indictments, and all other provisions of law applying to prosecutions upon indictments to writs, and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments, or the execution of any service and to all other proceedings in cases of indictment, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as near as may be, apply to information, and all prosecutions and proceedings thereon."

Section 585.

"No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor as provided by law, before a justice of the peace or other examining magistrate or officer, *unless such person shall waive his right to such examination:* Provided, however, That information may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner, and the same proceedings may be had thereon, as provided by law in like cases of demand upon indictment filed."

Plaintiff in error WAIVED his preliminary examination and was bound over to the District Court. Afterwards, but in due time, the prosecuting attorney of Douglas County, the County in which the offense was committed, filed in that court, the court having jurisdiction of such cases, an information charging the same offense charged in the complaint filed before the magistrate.

Section 439 of the same Code provides:

"The accused may except to an indictment by: First—A motion to quash. Second—A plea in abatement. Third—A demurrer."

It will be remembered that by the terms of Section 581, *supra*, the provisions of the Criminal Code, in relation to indictments, are made applicable to informations.

Section 451 of the same Code provides:

"If the issue on the plea in bar be found against the the defendant, or if upon the arraignment the accused offer no plea in bar, he shall plead "guilty" or "not guilty", but if he plead evasively, or stand mute, he shall be taken to have pleaded "not guilty."

Bolln first filed a motion to quash for these, among other, reasons:

"That there is no authority of law under and by which the County Attorney is authorized to file an information charging this defendant with a felony."

"Because this prosecution is in contravention of *Section 1* of *Article 14*, of the constitution of the United States of America by which the state of Nebraska has been forbidden to deprive this defendant of life or liberty without *due process* of law."

The foregoing are the only provisions of the motion which, by any possible construction, can be said to refer to a federal question.

The motion also contained these paragraphs:

"Because the crime charged in the information is different from the crime charged in the information which was filed before the Police Judge as the basis of this prosecution."

"Because the defendant has had no preliminary examination touching the crime charged in this information, nor did he waive the same."

The motion was overruled. Bolln then filed a plea

in abatement which repeats paragraphs 1, 2, 3, 4, 8 and 9 of the Motion to Quash, but adds nothing thereto with respect to the subject covered by these paragraphs.

The state demurred to the plea, and the demurrer was sustained to all but the ninth paragraph. Afterwards, leave of the court having been first obtained, the state replied to that paragraph thus:

"Comes now the plaintiff, The State of Nebraska, and by leave of Court first had and obtained, for Reply to the ninth paragraph of the defendant's Plea in Abatement, heretofore filed herein, denies each and every allegation in said paragraph contained, except as herein expressly admitted.

Plaintiff admits that defendant has had no preliminary examination for said crime referred to in said 9th paragraph, but alleges that said defendant did waive said preliminary examination and his right thereto, as shown by the *records* of the court."

The plea was overruled. The prisoner was arraigned; he stood mute, and the court entered a plea of "not guilty" for him.

A trial was had and a verdict of "guilty" returned.

In due time a motion for a new trial was filed. It contained 273 assignments of error. We do not deem it necessary to call attention to more than three thereof.

"The Court erred in overruling the defendant's motion to quash, filed April 4th, 1896.

The Court erred in sustaining the demurrer of the State to the first paragraph of the defendant's plea in abatement.

The Court erred in sustaining the demurrer of the State to the fourth paragraph of the defendant's plea in abatement."

The motion to quash, it will be remembered, states

only two grounds, the first and fourth, which could be said to relate, in any way, to a federal question. And the plea in abatement sets forth the same grounds in the first and fourth paragraphs thereof. In no other place does the motion for a new trial state, or attempt to state, a federal question, or challenge the attention of the trial court to the claim of the prisoner that he had been, by it, deprived of a right under the constitution or laws of the United States.

The motion was overruled and judgment pronounced on the verdict. Within the time fixed by law, the case was taken to the Supreme Court of the state by Bolln.

In the assignment of errors, which he filed in that Court, he stated all the federal questions relied on, if indeed he relied on any at that time, in the following assignments:

Assignment 66:

"The Court erred in overruling defendant's motion to quash, filed April 4th, 1896."

[It will be remembered that the first and fourth paragraphs of the motion to quash, are the only ones which can be said to have any reference to a federal question. They are as follows:

1. "That there is no authority of law, under and by which the county attorney is authorized to file an information charging this defendant with a felony."

4. "Because this prosecution is in contravention of Section 1 of Article 14 of the Constitution of the United States of America by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law."]

Assignment 67:

"The court erred in sustaining the demurrer of the State to the first paragraph of defendant's plea in abatement."

[That paragraph reads thus:

"That there is no authority of law, under and by which the county attorney is authorized to file an information charging this defendant with a felony."]

Assignment 70:

"The court erred in sustaining the demurrer of the state to the fourth paragraph of defendants plea in abatement.

[The fourth paragraph reads thus:

"Because this prosecution is in contravention of Section 1, Article 14 of the Constitution of the United States of America, by which the State of Nebraska has been forbidden to deprive this defendant of life or liberty without due process of law."]

From the foregoing it appears that assignments 67 and 70 cover the same ground as assignment 66, and all point to only one part of the Federal Constitution; viz: Sec. 1 of the 14th amendment.

It is a rule of decision of the Supreme Court of Nebraska, that assignments of error not referred to or argued in the brief, will be deemed waived.

Peaks v. Lord, 42 Nebr., 22. "There are some assignments of error which are not referred to in the brief of plaintiff in error, and in accordance with the established rule of this court these will be deemed waived and not further noticed."

Madsen v. The State of Nebraska, 44 Nebr., 631. (632.) This is a criminal case. We quote therefrom: "It has more than once been held that assignments in a petition in error not argued in the brief will be considered waived."

Kaufmann v. Cooper, 46 Nebr. 644. (650.) "Errors were assigned and the action of the trial court

in admission of evidence, but they were not argued in the brief of plaintiff in error, hence will be treated as waived."

Wood Mowing and Reaping Machine Co. v. Gerhold 47 Nebr., 397, (398.) "The petition in error contained six assignments, but two of which — the verdict is contrary to the evidence, errors in the admission testimony, — are argued in the brief. The other assignments are deemed waived."

Bolln v. The State, 51 Nebr., 581 (584.) (This case.) "While we are confronted with a record of over 1,000 pages, and a petition in error containing 279 assignments, the questions to be determined are not numerous, since most of the assignments are not discussed in the brief of defendant below. The familiar rule that assignments not relied on the briefs are deemed waived will be adhered to in this case."

Neither in the trial court or in the Supreme Court, was any reference made to any federal statute.

Neither in the trial court or in the Supreme Court, was any reference made to any provision of the constitution of the United States except Section 1 of Article 14 of the amendments to the Constitution of the United States.

The part of the brief of plaintiff in error in the court below which contains any reference whatever to federal questions, is set out in the certificate of the Chief Justice, printed in the record. We invite the especial attention of the court to this paragraph of that brief:

"*We do not question* the *authority* of the *legislature* to provide by suitable enactments for the trial of persons for information for felonies and what has been above said in argument has been so said with special reference to the case of *Miller v. The State*

45 N. W. 451, and we respectfully submit that none of the questions above discussed, seem to have entered into a consideration of that case." (Record p—)

The Supreme Court of the State of Nebraska affirmed the decision of the court below on May, 18th, 1897. Under the rule of the court, the plaintiff in error had forty (40) days within which to file a motion for rehearing. This motion was never filed.

ARGUMENT AND BRIEF OF THE LAW.

Points.

I. Whatever federal questions may be set up in the record, none of them were presented to the state Supreme Court for its judgment. But on the contrary all such questions were expressly, as well as by implication of law, waived by the plaintiff in error, and the court did not pass on, or consider, any of them.

II. The judgment of the state Supreme Court was on local grounds which are sufficient to sustain it, and, hence, this court is without jurisdiction to review it.

III. But if the foregoing propositions be resolved against us, we shall then contend that the only right "set up or claimed" in the state Supreme Court, is the right of "due process of law" AS SECURED BY SECTION 1 OF THE 14TH AMENDMENT to the federal constitution, for the reason that plaintiff in error in his assignment of errors in that court, *expressly* claimed that right, under that section, and did not claim it, or any other right, un-

der any *other* section of the constitution, or under any federal statute, either specifically or generally.

IV. Due process of law, as secured to the plaintiff in error under Section 1 of Article 14 of the amendments to the Constitution, was not denied to him by the state, in holding him to answer, for the crime of embezzlement, on the information of the county attorney, instead of on the presentment or indictment of a grand jury.

V. Neither was it denied to him by the refusal of the court to submit to a jury the issue raised by his plea in abatement.

VI. Neither the fifth nor the sixth amendment to the Federal Constitution, in itself, limits the power of the state, and, hence, neither forbids the legislature to pass a law giving to county attorneys the power to bring persons, charged with felonies, to trial on an information duly filed.

VII. The enabling act does not apply the restrictions of the fifth and sixth amendments of the federal constitution to the State of Nebraska, for these reasons, among others which will be stated when we come to discuss this point, that the state was not admitted under the enabling act; that the declaration required by the first sentence of the fourth section of the enabling act, and upon which plaintiff in error bases his contention that the restrictions of the fifth and sixth amendments are applicable to the state, was never made; and that the act of February 9th 1867 admitting the state did not require the making of the declaration.

I.

Whatever federal questions may be set up in the record, none of them were presented to the Supreme Court for its judgment, but on the contrary all such questions were expressly, as well as by implication of law, waived by the plaintiff in error, and the court did not pass on, or consider, any of them.

1st. FEDERAL QUESTIONS EXPRESSLY WAIVED;

Counsel for plaintiff in error, in his brief in the Supreme Court of the state, uses this language:

> "We do not question the authority of the legislature to provide by suitable enactment for the trial of persons upon information of felonies and what has been above said in argument has been so said with special reference to the case of *Miller v. The State*, *45 N. W. 451*, and we respectfully submit that none of the questions above discussed seemed to have entered into a discussion of that case." (Record, Page)

He thus told the court in very clear and unmistakable phrase that he did not "set up or claim" any "right, title or immunity" under the federal constitution; that he admitted the power of the legislature to authorize the county attorney to bring to trial on information persons charged with felonies. He now denies that power, and says in this court that under the provisions of the fifth amendment to the Federal Constitution, made applicable by the enabling act, the legislature of the state was prohibited the power to hold any person to answer for a felony, "unless on presentment or indictment of a grand jury." He now denies what he then expressly asserted. Will he be permitted to do that? We think not. We think he will not be

heard to assert a right in this court which he said in the state court did not belong to him.

To make it clearer, if such be possible, that plaintiff in error did not have in mind, when he presented his case to the state Supreme Court, the rights which he now claims under the Enabling Act, and the fifth, sixth, and fourteenth amendments to the Constitution, let us turn back a few pages of his brief in that court, and, commencing where he commences his discussion of the power of the county attorney to prosecute on information filed, examine critically the ground upon which he denies that power, and we will see that his waiver or admission, quoted above, is only the logical sequence of the argument that precedes, and, hence, that it is not an incautious remark. (See record p)

He first quotes the provisions of the state constitution which says that:

"The state legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor and may, by law, abolish, limit, change, amend or otherwise regulate the grand jury system."

Next he declares that in criminal, as well as in civil cases, there must be an issue of fact made by proper pleadings.

He then points out how, in early times, the power to bring persons to trial on information filed by the public prosecutor, was abused, and that this abuse led to the establishment of the rule, that none could be made to answer except on indictment duly returned by a grand jury. And then he follows with this statement:

"It would seem then that nothing short of a legislative enactment in the plainest and most unequivocal

language would be sufficient to take away so valued an immunity, and no legislative enactment should be permitted by mere implication to do so."

He thereby concedes, if not expressly, certainly by necessary implication, that it was in the power of the legislature to empower county attorneys to bring persons to trial for felonies on information. But he insists that such power must be conferred by a legislative enactment in the plainest and most unequivocal language.

After calling attention to his client's refusal to plead he continues: "The sole authority for the prosecution of offences by information is found in Chapter 54 of the Code." The next three paragraphs give abstracts of certain provisions of that chapter, and then he states that:

"Nowhere in the act is there any express language that an accused shall be held to answer to the information of a public prosecutor, as the language of the constitution gave authority to the legislature to provide by appropriate legislation. In the whole act there is nothing more than a bare implication that an accused should be required to enter a plea."

He further says: "The language of the Constitution *gave authority* to the legislature to provide by appropriate legislation" for the prosecution of persons charged with felonies on information, and his only complaint is, that the language of the act of the legislature, under which that power is claimed, is not sufficiently clear; that if such power exist, it was conferred, not in express terms, as it should have been, but by "nothing more than a bare implication."

Having thus stated his position, he declares in the next paragraph that "upon this ground the defendant claims that his trial upon the information of the county attorney was not only in contravention of the article

of the constitution referred to but was also in contravention of Section 3 of Article 1 of our constitution and also of Section 1 of Article 14 of the Constitution of the United States. Both of which provisions guarantee that no person shall be deprived of life or liberty without due process of law and we now claim for our client the protection of those constitutional provisions."

It will be noticed, that this is his first reference to the federal constitution in his brief, and that he places his claim to protection, under that instrument, on the fourteenth amendment thereto, and not on any other amendment or provision. He declared, "And we now claim for our client the protection of those constitutional provisions." What constitutional provisions? Section 10 of Article 1, and Section 3 of Article 1 of the State Constitution; and Section 1 of Article 14 of the Constitution of the United States. And the nature of his claim, as he puts it, is that the act of the legislature of the state, under which he was held to answer on the information of the county attorney, did not say in "express language, that an accused shall be held to answer to the information of a public prosecutor"; that there is "nothing more than a bare implication" that he should be so held; that this implication was not enough to warrant the conclusion that he should be so held; and, hence, that there was no power to hold him, and that, in holding him, he was deprived of his liberty without due process of law, within the meaning of the fourteenth amendment. He does not claim that the fourteenth amendment, or any other amendment for that matter, *prohibited* the *legislature* from passing such an act, but claims, simply, that the act does not provide for prosecutions on information. In other words, while admitting the power of the legislature to pass the act, he denied that it had exercised the power con-

ferred upon it by the constitution. Manifestly the question thus raised is a local, a state, question, and not a federal question.

In the next paragraph of his brief he continues thus, "Again the provisions of the chapter referred to are vastly wider in their scope than the title of the act would indicate." Whether they are or not, is a local question.

The same paragraph has this to say: "Nor is there anything in the title 'prosecution of offences by information' that would challenge the attention of the legislator that the bill was intended to be so far reaching as to provide for the prosecution of offences of the gravity of felonies — that is where the punishment was by imprisonment in the penitentiary — by information of a public prosecutor and thereby supply such legislative authority as might be permissible under Section 10, Article 1, of the Constitution."

His complaint is, that the title of the act under which he was prosecuted was not broad enough; that there was nothing in it "which would challenge the attention of the legislator" to what the act contained. Purely a local question. Following this complaint, he again admits in the closing phrase of the paragraph the authority of the legislature, under Section 10, Article 1 of the state Constitution, to pass such an act.

He then says that if the act is unconstitutional, the court should so declare; and in the next paragraph admits again the power of the legislature to pass such an act. His language is: "And the constitutional permission is for the legislature to enact by appropriate legislation for the prosecution of felonies by information."

In the paragraph that follows next, he returns to

a discussion of the title of the act, and says that there is nothing in it that would lead one to suppose that it conferred power on the public prosecutor to prosecute on information.

Then he gives the second and third sections of the act for the purpose, obviously, of supporting his contention that they do not, by express terms, confer the power of prosecution by information. He says of them "These proceedings [provisions] merely point out a procedure, and give no authority for the procedure itself."

The next paragraph deals with the section providing when grand juries shall be called. And he says of it, that it is absolutely void because it "could have no force unless it had been enacted as an amendment to that chapter", meaning Chapter 29 referred to by him a few lines above.

Following this immediately, is the paragraph quoted by us at the opening of the discussion under this head, in which counsel expressly admitted the power of the legislature to pass the act conferring upon county attorneys authority to hold men charged with felonies to answer on information, a power which he now denies, in this court. From the foregoing it is manifest:

1. That counsel for plaintiff in error did not deny in the state court the right of the legislature to empower, by suitable enactment, county attorneys to prosecute for felonies on information properly filed, but, on the contrary, that he expressly admitted that power.

2. That his claim in that court was, that the legislature had not conferred that power by suitable enactment, and that in holding his client to answer on an

information, not authorized by a state law, passed in conformity with the manner provided by the state constitution, he was deprived of his liberty without due process of law within the meaning of the 14th amendment.

Therefore, whether he was, or was not, so deprived, depends solely on the question, whether the legislature of the state had exercised its conceeded power, to pass the law complained of, in accordance with the provisions of the STATE constitution—a purely local matter.

That plaintiff in error, when in the Supreme Court of the state, did not think of raising any of the federal questions which he presents in this court, is, consequently, quite clear from the record. Mr. Justice Harlan said in *Kipley v. Illinois, 170 U. S. 187:*

"It is manifest, that when the answer was drawn, neither the defendant Kipley nor the learned counsel representing him intended to raise any question of a federal nature. We cannot suppose that it occured to either of them at that time that the civil service of Illinois was repugnant to the Constitution of the United States."

So it may be said in this case, that it is manifest it did not occur to either the plaintiff in error or his counsel while in the court below, that the legislature of the State of Nebraska was prohibited, by the federal constitution, from passing a law authorizing the county attorney to hold persons charged with felonies to answer on information duly filed.

2. FEDERAL QUESTIONS WAIVED BY IMPLICATION OF LAW.

As we have just attempted to show, plaintiff in error did not argue in his brief in the state Supreme

Court any federal question. Therefore, even if this court should be of opinion that in his petition in error, or otherwise, he set up or claimed a right under the federal constitution, or under a federal statute, in that court, such right was waived by him in the Supreme Court of the State, for it is a rule of decision in that court that all points not argued in the brief are deemed waived.

Peaks v. Lord, 42 Neb., 22. "There are some assignments of error which are not referred to in the brief of plaintiff in error, and in accordance with the established rule of this court these will be deemed waived and not further noticed."

Madsen v. The State of Nebraska, 44 Nebr., 631. (632). This is a criminal case. We quote therefrom: "It has more than once been held that assignments in a petition in error not argued in the brief will be considered waived."

Kaufmann v. Cooper, 46 Nebr., 644. (650). "Errors were assigned and the action of the trial court in admission of evidence, but they were not argued in the brief of plaintiff in error, hence will be treated as waived."

Wood Mowing and Reaping Machine Co., v. Gerhold, 47. Nebr., 397. (398). "The petition in error contained six assignments, but two of which—the verdict is contrary to the evidence, errors in the admission of testimony—are argued in the brief. The other assignments are deemed waived."

In this very case—the case at bar—when it was before that court the rule announced in the foregoing case was announced and enforced in the following language:

"While we are confronted with a record of over 1,000 pages, and a petition in error containing 279 assignments, the questions to be determined are not

numerous, since most of the assignments are not discussed in the brief of defendant below. The familiar rule that assignments not relied on in the briefs are deemed waived will be adhered to in this case."

Plaintiff in error was familiar with that rule, and, therefore, in failing to argue the federal question, set up in his assignment of errors in the state court, he knowingly waived them, if it was competent for him to do so. Was it? The statute, under which this court takes jurisdiction of such cases as this, contemplates that he might, for it says, in effect, that only those federal rights which are "set up or claimed" may be considered by this court. Even though the plaintiff in error should have a right under the federal constitution, or a federal statute, if he failed to set it up or claim it in the lower court, he could not ask to have it enforced in this court. He would be deemed to have waived it.

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one.

Pierce v. Somerset R. R. Co., 171 U. S. 641, (648).

3. THE STATE SUPREME COURT DID NOT PASS ON OR CONSIDER ANY FEDERAL QUESTION.

This is shown by the quotation which we have just given from the opinion of that court. It deemed all questions waived which were not argued. The federal question presented in the petition in error, if there was one presented there, was not argued, and, hence, was deemed waived.

II.

The judgment of the state Supreme Court was on local grounds which are sufficient to sustain it, and, hence, this court is without jurisdiction to review the judgment.

1 The Supreme Court of Nebraska decided, in effect, as we have just shown, that the federal questions set up in the record, if there were any, were waived by the plaintiff in error under the practice existing in that court. Whether he did or not, was purely a local question, and the decision thereon will not be reviewed by this court. A decision on a question of practice by which a party is prevented from having a federal question presented to the state court for its consideration and judgment, is not reviewable in this court.

In Kipley v. Illinois, supra, the defendant made application to the Supreme Court of the state, where the action was originally brought, for leave to file an amended answer, which set up certain federal questions. That court denied the application. Judgment finally went against Kipley. He then took the case to this court for review. The only federal questions upon which he relied for that review were those set up in the amended answer which the Supreme Court of Illinois would not permit him to file. And the question presented to this court, for decision was whether or not it would hold that the federal questions relied on were properly set up in the lower court so as to give this court jurisdiction to review them. The court, speaking through Mr. Justice Harlan, said:

"This action of the state court does not raise a federal question which this court can examine."

Continuing the learned justice observed: "The suggestion that the Federal questions which would

have been raised, if the answer had been amended as proposed, should be considered upon their merits precisely as they might have been if the motion to amend had been allowed, cannot be entertained for a moment."

In the Kipley case the state court was called upon to pass on a question of practice in that court, that is, whether or not the defendant was entitled, under the circumstances then presented to the court, to file his amended answer, and it decided that question adverse to the defendant, and thus, in effect, cut him out of the right to set up certain rights which he claimed under the federal constitution. In the case at bar, the Supreme Court of Nebraska was called upon to pass on a question of practice, as to whether or not the federal questions raised in the petition in error were before the court for its consideration and judgment, and it decided that under the practice in that court they were not. There was nothing in the Illinois case according to the opinion of this court to justify the conclusion that the ruling on the motion to file the amended answer was prompted by a desire to deprive Kipley of any right or immunity which he might have under the federal constitution. And so it must be held with respect to the action of the Supreme Court of Nebraska, that it had no intent, when deciding that all questions not argued were waived, to deprive Bolln of any right or immunity which he might have under the federal statutes or constitution, for in that decision the court was following a long line of its own adjudications.

The state Supreme Courts in both cases did not consider the federal questions relied on in this court, because of a rule of practice in those courts which prevented the questions from coming before the court

for consideration and judgment. Therefore we submit, that the rule in the Kipley case should be the rule in this case.

The judgment of the lower court in this case rests:

1. On the rule of practice that points not argued in the brief are deemed waived; that the federal questions, if any, set up or claimed in the assignment of errors, were not argued in the brief and, hence, were waived by plaintiff in error, and

2. On the construction of state statutes and principles of general law, as distinguished from the federal constitution and federal statutes.

These grounds were sufficient to sustain the judgment, and, hence, this court will not review it. The following authorities are in point:

Seneca v. Christie, 162 U. S. 283. (289.) "As it appears that the decision of the court of appeals was based in addition to other grounds, upon a distinct and independent ground not involving any federal question and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rule on that subject and cannot be maintained."

Eustis v. Bolles, 150 U. S. 361. (366.) Mr. Justice Shiras says: "it is likewise a settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, and another question not federal has been raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the federal question to sustain the judgment, this court will not review the judgment."

Pierce v. Somerset R. R. Co., 171 U. S. 641. (648.) "That is a federal question. The other related to the defense of estoppel on account of laches and

acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the state court. In such case a writ of error to the state court cannot be sustained."

2. THE HOLDING OF THE COURT, WITH RESPECT TO THE CLAIM OF THE PLAINTIFF IN ERROR, THAT HE WAS DENIED DUE PROCESS OF LAW BY BEING REFUSED A TRIAL BY JURY OF THE ISSUE RAISED BY THE PLEA IN ABATEMENT AND THE REPLY THERETO.

The decision of the court with respect to this claim, was upon a ground purely local, and quite sufficient to sustain it. The ground was, that plaintiff in error did not bring the question properly before the court. Here is the language of the decision on that point:

"The testimony adduced relating to the plea in abatement was not brought into the record by a bill of exceptions, nor is the transcript of the proceedings in the magistrate's court before us, therefore we are unable to determine whether the court below erred in denying the accused a trial of his plea in abatement by a jury. The issue of fact joined on this plea in abatement, involving as it did the question of a record in the case at bar, could be properly determined by the court without the intervention of a jury."
Bolln v. State, 51 *Nebr.* 581. (587.)

III.

But if the foregoing propositions be resolved against us, we shall then contend that the only right "set up or claimed" in the state Supreme Court is the right of "due process of law," as secured by Section 1 of the 14th amendment to the federal constitution; for the reason that plaintiff in error in his assignment of errors in that court

expressly claimed that right under that section, and did not claim it, or any other right, under any other section of the constitution, or under any federal statute, either specifically or generally.

Let us examine what plaintiff in error claims in *this* court, and, if it be a right protected by the federal constitution, or a federal statute, whether he claimed it in the state court. The first assignment of error is in substance:

(a) That under Section 11, Article 1 of the State Constitution, the court erred in denying him a trial by jury of the issue of fact tendered by his plea in abatement—purely a local question.

(b) That by that denial, he was deprived of due process of law contrary to Section 1 Article 14 of the Amendments to the Constitution. In the court below nothing was said about that denial violating any of his federal rights.

The second assignment of error is in substance:

That the enabling act, and the action of the members of the Constitutional Convention thereunder, made the sixth amendment to the federal constitution a limitation on the power of the state legislature, and that the court, by the denial set forth in the first assignment, deprived him of a right under the sixth amendment. No mention of this amendment was made in the state court, nor was there any intimation given that he claimed any right under it. Neither was there any reference in that court to the Enabling Act. He, as we have seen, and shall see hereafter, limited his federal right to due process of law under the 14th amendment.

The 3rd Assignment asserts, in effect, that by the

same denial he was deprived of due process of law under the *14th* Amendment. No claim, as we have already seen, was made in the lower court that a denial of a jury trial of this issue violated any right which plaintiff in error had under the 14th, or any other, amendment, or under any federal statute.

The 4th Assignment asserts, in effect, that Chapter 54 of the Criminal Code is in conflict with the state constitution—a local question, purely.

The 5th Assignment asserts, in effect, that the court erred in holding that Chapter 54 of the Criminal Code authorized the prosecution of felonies by information, and thus deprived the plaintiff in error of due process of law under the 14th Amendment. This was claimed at one time in the state court, and, if it can be said to present a federal question, it is the only one there asserted.

The 6th Assignment is, in effect, that the holding referred to in the 5th Assignment, violated a right which Bolln claimed under the 5th Amendment to the federal Constitution, as made applicable to the State of Nebraska by the Enabling Act and the action of the members of the convention thereunder. This right was not claimed in the state court. No reference whatever was made in that court to the 5th Amendment or the Enabling Act, and no right was claimed which would clearly point out to the court, that Bolln claimed anything under that amendment or act. Indeed, there is nothing in the record that even intimates any claim under the 5th Amendment, or under the Enabling Act.

The 7th Assignment is, in effect, that the judgment of the court deprived him of due process of law under the 14th Amendment. This Assignment was not made in the lower court, unless it would follow as an inference

from the assignment, that he had been deprived of due process of law under the 14th Amendment in being required to answer for a felony on information instead of on an indictment.

The Record, therefore, is:

1. That he did not at any time in the lower court set up or claim, that the denial of a trial by jury of the issue of fact raised by his plea in abatement violated any federal right which he had.

2. That he did not claim that a right which he had under the 6th Amendment to the Constitution was violated.

3. That he did not claim that a right which he had under the Enabling Act was violated, and

4. That the only right which he claimed in that court was the right of due process, not generally, but only in so far as it was secured to him under the 14th Amendment, and which he attempts to set forth in the fifth assignment in this court.

Under this state of the record, we claim that in no event can this court review any question excepting one; which is, in effect, that plaintiff in error was denied due process of law, by reason of being compelled to answer for the crime of embezzlement on the information of the county attorney, instead of on an indictment by a grand jury; for the reason that, under the authorities which we shall now present, none of the other questions were properly raised in the court below.

California National Bank v. Thomas, 171 *U. S.* 441. "Unless the plaintiff in error was denied some right under the Constitution or statutes of the United States specially set up and claimed by it, this writ error must be dismissed."

Oxley Stave Co. v. Butler Co., 166 *U. S.* 64 (653.)

"Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

We may say in connection with this quotation, what we have already remarked more than once, that outside of the one claim, that plaintiff in error was denied due process because he was held to answer on information instead of an indictment, none was brought to the attention of the state court. And even that claim was expressly waived. And for ought that appears, the state court proceeded in its determination of the case without any thought that it was expected to decide a federal question.

"The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court."

Oxley Stave Co. v. Butler Co., supra page 655.

While it has been held by this court, that it is not necessary to set out in the court below the particular provision of the Constitution relied on, it has never been held, that it is not necessary to state that a right

is claimed under the Constitution or under a federal statute, as the case may be.

Mr. Justice Miller has stated this point forcibly in the case of the Bridge Proprietors, 1 Wallace, 116. We quote from page 143:

> "But the true and rational rule is that the court must be able to see clearly from the whole record that a certain provision of the Constitution, or act of Congress was relied on by the party who brings the writ of error and that the right thus claimed by him was denied."

Apply that rule to the case at bar. We claim, that it cannot be seen clearly, or at all, from the record in this case, that any provision of the Constitution, or of any Act of Congress was relied on by Bolln, excepting the 1st Section of the 14th Amendment, and that only to the extent that we have heretofore indicated.

The rule thus announced by Mr. Justice Miller was quoted and approved in

Green Bay etc. Canal Co., v. Patten Paper Co., 172 *U. S. 68.*

Pozzell v. Brunswick, 150 *U. S.* 433. (440.)

Mr. Chief Justice Fuller says in the latter case:

> "A definite issue as to the validity of the statute the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a Federal question by its decision."

To the possible suggestion, that there are some stray statements in the record to the effect that the act of the legislature complained of is "in violation of the Constitution," we call attention to the rule laid down in *Miller v. Cornwall R. R. Co.*, 168 *U. S.* 131. (134), which is in this language:

"It was long ago held that where it was objected in the state courts that an act of the State was 'unconstitutional and void' the objection was properly construed in those courts as raising the question whether the state legislature had the power under the state constitution to pass the act, and not as having reference to any repugnance to the Constitution of the United States."

The rule announced above is stated and enforced in *Kipley v. Illinois*, 170 *U. S.* 187.

In the case of *Miller v. Cornwall*, *supra*, it was claimed in the lower court, that one of the parties was denied due course of law. In this court the same party contended that, that claim raised a question under the Federal Constitution, but Mr Chief Justice Fuller, on page 134, said, that the presumption was that it referred to the State Constitution.

In conclusion we feel justified in claiming, that, under the foregoing authorities, the plaintiff in error raised but one question in the state Supreme Court, and that is, that he was denied due process of law under the 14th Amendment by reason of being compelled to answer for his crime on an information instead of an indictment, and that the other questions which he now raises in this court cannot be considered, because they were not "specially set up or claimed" in the court below. And this is, it seems to us, not only right upon authority but upon principle. There is absolutely nothing in this record to show, that the attention of the Supreme Court of the State was ever directed to any provision of the Federal Constitution, except Section 1 of the 14th Amendment., and afterwards the point was waived. The Enabling Act was never refered to in any of the pleadings or in the argument This being so does not the rule *expressio unius est*

exclusio alterius apply with controlling force. Plaintiff in error expressly and repeatedly claimed the protection of Section 1 of Article 14, and of no other provision of the Constitution or of any law of the United States, and this being so, by what system of reasoning can it be said that he specially set up or claimed a right under anyother provision of the Constitution, or under any Federal statute. If he claimed his right under the Federal Constitution generally, without specifically seting out any Section or article, then there might be some reason for contending that he invoked every right which by chance he might have under any provision of that instrument, and it might be said that every such right was brought to the attention of the court, and that, in deciding against him, the court denied the particular rights which he now asserts in this court. We say that might result where he claimed under the whole constitution, but that cannot be so where he claimed under only one provision, and thus, in effect, declared to the Supreme Court of the state, that he did not claim under any other provision — that he asked at its hands only the rights accorded to him by the 14th Amendment, so far as the constitution and laws of the United States were concerned.

The provisions of the constitution, outside of the 14th Amendment, under which he now claims rights are, as we have heretofore seen, the 5th and 6th Amendments. These amendments he cannot apply to himself, except through the Enabling Act. If that act did not say that the members of the constitutional convention "shall adopt the constitution of the United States" etc., he would not be now claiming any protection under the two last mentioned amendments. These amendments are limitations on the powers of

Congress and not on the powers of the state. So well is this settled, that we deem it necessary to cite only a few authorities:

Barron v. Mayor of City Council, 7 Peters, 243;
Fox v. State of Ohio, 5 How. 410.

Therefore under those amendments, the 5th and 6th, unaided by the Enabling Act, he would have no right at all. Nor does he claim either in his assignment of error or brief in this court, that he would have one. He bases his claim on the Enabling Act — an act of Congress which he says applies the 5th and 6th amendments to his case. A statute of the United States then is drawn in question. Under it he claims every right which he asserts in this court outside of the claim under the 14th Amendment.

Yet neither in the pleadings nor in his brief in the state court, did he give any intimation whatever of a claim under this Federal statute. It cannot be said, therefore, that a right twas "specially set up or claimed" under the Enabling Act, or any other Federal statute, in the court below.

And we, therefore, respectfully submit, that if plaintiff in error has a right to have any question examined in this court, he is limited to the one set up under the 14th Amendment, that is, that he was denied due process of law by being held to answer on an information, instead of on an indictment.

IV.

Due process of law, as secured to the plaintiff in error under Section 1 of Article 14 of the amendments to the Constitution, was not denied to him by the state, in holding him to answer for the crime of embezzlement on the information of the county attorney, instead of on the presentment or indictment of a grand jury.

1. Whether requiring the plaintiff in error to

answer for a felony on information filed, instead of the indictment of a grand jury, deprived him of due process of law under the 14th Amendment, has been settled by this court adverse to his contention.

Hurtado v. People, 110, *U. S.* 516 (538). After an examination of nearly all, if not all, the learning on the subject of what constitutes due process of law, the court, speaking through Mr Justice Matthews, stated its conclusion, thus:

"Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and committment by a magistrate, certifying the probable guilt of the defendant, with the right on his part to the aid of counsel and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprison of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments."

McNully v. California, 149 *U. S.* 645. Mr. Justice Fuller, discussing the same subject, said, on page 648:

"It was settled in *Hurtado v. California*, 110 *U. S.* 516, that the words 'due process of law' in the 14th Amendment did not necessarily require an indictment by a grand jury in a prosecution by a State for murder, whose constitution authorizes such prosecution by information."

Other courts have held to the same effect.

Rowan v. The State, 30 *Wis.*, 129. (149.) Judge Cole said, on the latter page:

"And the words 'due process of law,' in this amendment, do not mean and have not the effect to limit the powers of the state governments to prosecutions for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed forms and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society, and if people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our state constitution as it now stands, and nothing in the 14th Amendment to the constitution of the United States which prevents them from doing so."

State v. Boswell, *104 Ind.* 541. (543). "It seems clear to us that one who is tried and convicted upon an information provided for by a constitutional state statute is not deprived of his liberty without due process of law, for we preceive no reason for doubting the soundness of the proposition that proceedings founded upon an information provided for by a legally enacted statute to constitute due process of law."

In Re Humason, *46 Fed. 388.* Judge Mumford had before him the statutes of the State of Washington, similar to the Nebraska statute with respect to trial of persons charged with felonies on information, and he was asked to decide, that such a statute did not afford the prisoner due process of law. Following the case of *Hurtado v. California*, *supra*, he said:

"That decision is conclusive. Since it was rendered hundreds of men have been proceeded against by information, and punished, and it is too late now to question the validity or constitutionality of state

laws authorizing prosecutions for local offences by information, or to longer maintain that an indictment by a grand jury is essential to "due process of law."

V.

Neither was due process denied to him under the 14 Amendment by the refusal of the Court to submit to a jury the issue tendered by his plea in abatement.

But first, how was this question raised? Did plaintiffs specifically set up or claim it in the court below? Did he ever even intimate in pleading or brief that he was thereby denied a right under the Federal constitution or an act of Congress. The record is plain and from it the answer must be known. Here is all he said about the claim in his petition in error in the Supreme Court of the state:

"The court erred in denying the demand of the defendant for a jury trial upon the issue of fact raised by the ninth paragraph of defendant's plea in abatement and the reply of the state thereto."

How did the court err? By not properly applying a state statute, or the state constitution or a principle of general law? It does not say. Certainly, then, he did not specially set up or claim a right under the Federal constitution, or a Federal statute, as required by the 25th Section of the judiciary act, and the decisions of this court interpreting the same.

In his discussion of this point in his brief in the state Supreme Court, which is presented in the certificate of the Chief Justice, made a part of the record here by stipulation, he in no place refers to the Federal Constitution or a Federal statute. The only right which he there claimed, with respect to this matter,

was a right under the Constitution and laws of the state. We are willing, however, to discuss it here.

To return to the question, did the refusal of the court to submit the issue to a jury deny plaintiff in error due process of law? He alleged in the 9th Paragraph of the plea that "the defendant has had no preliminary examination touching the crime charged in this information, nor did he waive the same."

To this the state replied:

> "Plaintiff admits that defendant has had no preliminary examination for said crime referred to in said ninth paragraph, but alleges that said defendant did *waive* said preliminary examination and his right thereto as shown by the *records* of the court."

The issue then for decision was, whether or not the records of the court showed that Bolln waived his preliminary examination. And that, of course, could be decided only by an inspection of the transcript of the record, sent up by the Examining Magistrate under Section 306 of the Criminal Code, which reads as follows:

> "It shall be the duty of every magistrate in criminal proceeding to keep a docket thereof as in civil cases. All recognizances taken under this title, together with a transcript of the proceedings, where the defendant is held to answer, shall be certified and returned to the clerk of the court at which the prisoner is to appear. The transcript shall contain an accurate bill of all the costs that have accrued, and the items composing the same."

Of the action of the trial court in denying Bolln a jury trial of the issue thus raised, the state Supreme Court in its opinion, on page 587, said:

> "The issue of fact joined on this plea in abatement involving as it did the question of a record in the

case at bar could be practically determined by the court without the intervention of a grand jury."

Is not this correct? We think it is. And we submit, that at common law, whenever the issue was to be settled by the inspection of the record, that issue was triable by the court alone. Such a trial was called trial by record. And of this trial, Blackstone, on page 329 of Book 3, says:

"This is only used in one particular instance; and that is where a matter of record * is pleaded in any action, as a fine, a judgment or the like."

After pointing out how the issue is tendered and joined, he observes, on the same page:

"The trial therefore, of this issue is merely by the record; for as Sir Edward Coke (b) observes, a record or enrollment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself."

Cooley's Blackstone, 3d Ed., Vol. 2, 190.

Tidd in his work on Practice, Vol. 2, page 744, says on the same subject:

"When the defendant pleads *nul tiel* record of a judgment &c., the record is commonly produced by the plaintiff; and in that case, the master in the King's Bench, who reads the issue and compares it with the record, will mark on the draft of the issue that the plaintiff hath produced the record; upon which the clerk of the rules will give a rule for judgment."

Andrew Steven's Pleadings, 189: "The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate made of trying such issue, and the parties cannot put themselves upon the country."

It may not be amiss to remark here that plaintiff

in error in his plea in abatement did not "put himself upon the country." If he was entitled to a trial by jury under the statute, this would not be necessary, but the statute does not say that he shall have a jury trial. Therefore, if he claims such trial according to the rules of the common law, he should have brought himself within those rules by "Putting himself upon the country." And for that reason, if for no other, he was not entitled to a jury trial.

Gray v. Pingry, 17 *Vt.*, 419. Judge Redfield, on page 422, said: "The issue formed upon the plea of *nul tiel* record could only be tried by the court, and should have been first tried, before it could be known that any issue for the jury would remain in the case."

Hill vs. The State, 2 *Yerg.* 248—9. "We are also of opinion that it was error to permit the jury to try *nul tiel* record. This was a matter to be tried by the court."

Epps Administrators vs. Smith, Administrator of Eagney, 4 *Munford*, 466. (467). The court said: "But that is also erroneous in so much thereof as decides on the first plea of any such record which if properly pleaded ought to have been decided by the court."

Martha v. The State, 26 *Ala.*, 72. (75). Chief Justice Chilton said on the latter page: "This was no invasion by the court of the province of the jury, for it was the duty of the court to declare the legal effect of the record insisted upon by the defendant as sustaining her pleas."

Hite v. State, 9 Yerg, 356. (380.) "If a jury had been sworn to try an issue upon *nul tiel* the court must have instructed them to find against the prisoner. Why then impanel a jury when the fact of identity

could not have been submitted to them. We are of the opinion that there was no legal necessity for it."

Brady v. Commonwealth, 1 Bibb, 517. "It was also erroneous to have tried the issue by jury instead of the court deciding it by the record."

Carter v. Wilson, 1 Dev. & Bat. 364. (Side paging.)

Boucher v. Williamson, 1 Dana, 227.

Carson v. Pearl, 4 J. J. Marsh, 92.

To conclude the discussion on this point, let us present the following from the opinion of Chief Justice Polland in the case of *The State v. Haynes*, 36 Vt., 667. (671.)

"But we understand that the defendants upon the introduction of these records of former convictions claimed a right to have the case submitted to a jury to determine whether they had been properly convicted or convicted at all of the prior offences as it was claimed these records showed."

Further down upon the same page the learned Chief Justice continues:

"These former convictions, by the rules of evidence applicable equally to civil and criminal trials, can be proved only by the records of the court, and what the records show, cannot be contradicted by any averment or proof."

"The question stood then upon the record of the former convictions alone, and the legal efficacy and effect of those was purely a question of law. Were the defendants entitled to have such question decided by a jury?"

Again on page 672:

"It is purely a question of law bearing upon the duty of the court, and not of the jury. To say that the defendants must have an opportunity to have this question of law submitted to a jury, so as to have

the benefit of the chance of their deciding it contrary to law, seems to us a very great absurdity."

From all of which it must be concluded, that plaintiff in error was not, according to due process of law, entitled to a trial by jury of the issue tendered by the 9th paragraph of his plea in abatement, and joined by the reply of the state.

VI.

Neither the fifth nor the sixth amendments to the Federal Constitution, in itself, limits the power of the state, and, hence, neither forbids the legislature to pass a law giving to county attorneys the power to bring persons, charged with felonies, to trial on an information duly filed.

Under the III. head of this brief the above proposition was discussed and supported by the citation of decisions of this Court. We do not think it necessary to say anything more here.

VII.

The enabling act does not apply the restrictions of the fifth and sixth amendments of the federal constitution to the State of Nebraska, for these reasons, among others which will be stated when we come to discuss this point, that the state was not admitted under the enabling act; that the declaration required by the first sentence of the fourth section of the enabling act, and upon which plaintiff in error bases his contention that the restrictions of the fifth and sixth amendments are applicable to the state, was never made; and that the act of February 9th 1867 admitting the state did not require the making of the declaration.

Before entering upon an examination of the above

proposition, it may be profitable to state a few facts in connection with the admission of Nebraska into the Union.

The Congress on the 19th of April 1864 passed an act entitled:

"An act to enable the people of Nebraska to form a constitution, and a state government, and for the admission of such state into the Union on an equal footing with the original states."

13 *United States Statutes at Large, page 47.*

The first section of this act provides

"That the inhabitants of that portion of the Territory of Nebraska included in the boundaries hereinafter designated be, and they are hereby, authorized to form for themselves a constitution and state government, with the name aforesaid, which state, when so formed, shall be admitted into the Union as hereinafter provided."

Section 2 defines the boundaries of the new state.

The third section provides for a constitutional convention, declares that the members thereof shall be elected on the first Monday in June thereafter, and authorizes the people of the territory

"to vote upon the acceptance or rejection of such constitution as may be formed by said convention."

The fourth section provides,

"That the members of the convention thus elected shall meet at the capitol of said territory on the first Monday in July next, and after organization shall declare, on behalf of the people of said territory, that they adopt the constitution of the United States; whereupon the said convention shall be, and it is hereby, authorized to form a constitution and state government; Provided, That the constitution when formed shall be republican, and not repugnant to the constitution of the United States and the principles of the Declaration of Independ-

ence: And provided further, That said constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States: First. That slavery or involuntary servitude shall be forever prohibited in said state. Second. That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship. Third. That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without the said state shall never be taxed higher than the land belonging to residents thereof; and that no taxes shall be imposed by said state on lands or property therein belonging to or which may hereafter be purchased by the United States."

The fifth section provides:

"And be it further enacted, That in case a constitution and state government shall be formed for the people of said territory of Nebraska, in compliance with the provisions of this act, that said convention forming the same shall provide by ordinance for submitting said constitution to the people of said state for their ratification or rejection at an election to be held on the second Tuesday of October, one thousand eight hundred and sixty-four, at such places and under such regulations as may be prescribed therein, at which election the qualified voters, as hereinbefore provided, shall vote directly for or against the proposed constitution, and the returns of said election shall be made to the acting governor of the territory, who, together with the United States district attorney and chief justice of said territory, or any two of them, shall canvass the same, and if a majority of legal votes shall be cast for said constitution in

said proposed state, the said acting governor shall certify the same to the President of the United States, together with a copy of said constitution and ordinances; whereupon it shall be the duty of the President of the United States to issue his proclamation declaring the state admitted to the Union on an equal footing with the original states, without any further action whatever on the part of congress."

There are nine other sections of the act, but as they have no bearing on the question now under consideration, we omit all further reference to them.

Pursuant to the terms of this enabling act, the people of the territory selected delegates to the constitutional convention, and those delegates met in convention on the day fixed in the act. But the people of the territory not being willing at that time to assume the responsibility of statehood, the convention adjourned without taking an action beyond its own organization. We present in this connection the following pertinent extract from the opinion of the Supreme Court of Nebraska in

Brittle v. The People, 2 *Nebraska* 198.

"In April 1864, Congress passed an enabling act, providing for the election, in June of that year, of delegates, who should meet in convention in July following, for the purpose of framing a constitution, with a view to the admission of Nebraska as a state into the Union. The sentiment of the people at that time being opposed, evidently, to becoming a state, the delegates chosen in the manner provided, upon meeting, refused to make a constitution, and adjourned *sine die*.

"Without any further act of Congress, the territorial legislature of 1866 submitted a proposed constitution to the electors, to be voted on in June of that year, with direction to choose, at the same time,

legislative, executive, and judicial officers for the proposed State. The governor, secretary of state, and auditor of the Territory, were, by the act submitting the instrument, constituted a board of canvassers; and they declared the constitution adopted by a majority of a hundred.

"The legislature thus chosen assembled in July, the time prescribed, and chose two senators to represent the State, who, together with the representative in Congress, took the proposed constitution to Washington, and prayed Nebraska's admission."

On the 9th of February 1867 the Congress passed another act entitled:

"An act for the admission of the State of Nebraska into the Union."

This act was passed the first time by the senate, after a long and stormy debate; was vetoed by President Johnson, and was passed over his veto. The following are the material parts thereof:

"Be it enacted etc., That the constitution and state government which the people of Nebraska have formed for themselves be, and the same is hereby, accepted, ratified and confirmed, and that the said State of Nebraska shall be, and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States, in all respects whatsoever."

Sec. 2. "That the State of Nebraska, shall be, and is hereby declared to be entitled to all the rights, privileges, grants, and immunities, and to be subject to all the conditions and restrictions of an act entitled 'An act to enable the people of Nebraska to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states.' Approved, April nineteenth, eighteen hundred and sixty-four."

Sec. 3. "This act shall not take effect except upon the fundamental condition, that within the State of Nebraska, there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed; and upon the further fundamental condition, that the legislature of said state, by a solemn public act, shall declare the assent of said state to the fundamental condition, and shall transmit to the President of the United States an authentic copy of said act; upon receipt whereof the president, by proclamation, shall forthwith announce the fact, whereupon, said fundamental condition shall be held as a part of the organic law of the state, and thereupon, and without any further proceeding on the part of Congress, the admission of state into the Union shall be considered as complete. Said State Legislature shall be convened by the Territorial Governor, within thirty days after the passage of this act, to act upon the conditions submitted herein."

Pursuant to this act, the Territorial Governor issued his proclamation, reciting the third section of the act verbatim, with the exception of the last sentence, and concluding thus:

"Now, therefore, I, Alvin Saunders, Governor of the Territory of Nebraska, do call upon the members of the State legislature of Nebraska, to meet at the capitol, in the City of Omaha, on Wednesday, the twentieth day of February, instant, at the hour of 2 o'clock P. M., for the purpose of taking action upon the conditions as proposed by Congress."

The legislature meet in accordance with the proclamation of the Governor and declared:

"Be it further enacted by the Legislature of the State of Nebraska, That the act of Congress of the United States, entitled 'An act for the admission of the State of Nebraska in the Union,' passed February 9, 1867, be, and the same is hereby rati-

fied, adopted, and accepted; and it is hereby declared That the provisions of the third Section of the said act of Congress shall be a part of the Organic Law of the State of Nebraska."

Then followed the names of the speaker of the house and of the president of the senate, also the words "Approved February 21, A. D. 1867. David Butler, Governor of Nebraska."

President Johnson, on the 1st of March, 1867, issued his proclamation, declaring the state had complied with the fundamental condition imposed by the third section of the act of February 9th, and that the admission of the state was complete.

We now return to our proposition: Counsel's entire argument, with respect to the application of the fifth and sixth amendments to the federal constitution to the State of Nebraska, is based upon that part of the fourth section of the enabling act of 1864 which reads as follows:

"That the members of the convention thus elected shall meet at the capitol of said territory on the first Monday in July next, and after organization shall declare upon behalf of the people of said territory that they adopt the constitution of the United States."

Of the declaration thus *required* counsel says:

(a) That it was made by the members of the convention.

(b) That it was a condition to the admission of the state into the Union, and, hence, was covered by the 2nd section of the admission act of February 1867, and

(c) That it is, therefore, binding, irrevocably, upon the people of the state, and has the effect, irrevocably, of making the constitution of the United

States a constitution of the State of Nebraska, binding upon it from the moment of its admission into the Union; limiting the state's power where it limits the powers of Congress, and granting to the state powers where it grants them to Congress.

I. *We deny that the declaration was made.*

This is proved conclusively by the extract which we have given from the opinion of the Supreme Court, wherein it is shown that the constitutional convention, after organizing, did nothing but adjourn. We can add nothing to this, and leave it as a settled fact, that the declaration was never made. It is clear, therefore, that, since plaintiff in error bases his entire argument, on this branch of the case, upon the theory that this declaration was made, and that thereby the restrictions of the fifth and sixth amendments to the federal constitution were made applicable to the state, his argument must fail.

II. *We deny that the act of February 9th admitting the state into the Union required the declaration under Discussion to be made, or treated it as made, by either the members of the constitutional convention or the people of the state. And we further deny that it was made a condition to the admission of the state.*

In the first place the declaration was never intended by the enabling act to be a condition precedent to the state's admission. Those things which were made conditions precedent are enumerated in the fifth section of the act. It is therein provided what must appear to the President before it shall become his duty to proclaim the state admitted to the Union. There were three things to be shown. First, The certificate

of the acting governor that the new constitution had received a majority of the legal votes cast. Second, A copy of that constitution, disclosing that it contained all the provisions required by the act. Third, A copy of the ordinance for the submission of the constitution to the people for their ratification or rejection. And when these things were shown to him, it was made his duty to declare the state admitted on an *equal* footing with the original states.

He was not required to ascertain whether or not the members of the convention had made the declaration in question. In fact, even if the President knew that it had not been made, it would still have been his duty, under the terms of the enabling act, to declare the state admitted. His duty to issue his proclamation to that effect was not to be affected, in any way, by the failure of the members of the convention to make the declaration.

Further, the enabling act provides in its first section that the inhabitants of the territory

> "be, and they are hereby, authorized to form for themselves a constitution and state government, with the name aforesaid, which state, *when so formed*, shall be admitted into the Union as hereinafter provided.

Therefore, the admission was to take place upon the formation of a constitution and state government by the inhabitants of the territory. That was all that the inhabitants were required to do to secure admission. The method of their admission was to be "as hereinafter provided" in the act.

Therefore, we say that this declaration was not made by the enabling act a condition, within the meaning of that word, as it is used in the act of February

9th admitting the state, and wherein it is provided that the state shall be "subject to the conditions" of the enabling act. It not being a condition of the enabling act, the state by the declaration of the act of February 9th, was not made subject to it.

2. To the possible suggestion that the admission of the state, is, in itself, conclusive proof, that all the requirements and conditions of the enabling act were complied with, we answer that such is not true, for the reason that the act of February 9th admitting the state declares upon what the state was admitted. It says in section 1:

> "Whereas, it appears, that the said people have adopted a constitution, which, upon due examination, is found to conform to the provisions, and comply with the conditions of said act [meaning the enabling act] and to be republican in its form of government, and that they now ask for admission into the Union: Therefore,
>
> Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled, That the constitution and State government which the people of Nebraska have formed for themselves, be, and the same is hereby, accepted, ratified, and confirmed, and that the said State of Nebraska shall be, and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States, in all respects whatsoever."

The admission was had then upon proof that the constitution complied with the conditions of the enabling act. There is nothing in the enabling act which requires the constitution to contain the declaration under consideration. And there could not be, therefore, in the nature of things, anything in it to show that that declaration had been made. And hence the

declaration, that the constitution complied with the conditions of the act, had reference to those provisions which were to be *embodied* in the constitution, and to nothing else.

3. It may be said that while it was not made a condition by the enabling act, to be performed by the *state*, it was a condition necessary to be performed by the *members* of the *convention* before they could legally proceed, under the terms of the enabling act, to form a constitution, and, hence, the declaration, in the act of February 9th, admitting the state subject to *all* the conditions of the enabling act, makes it subject to this condition. This cannot be so, because the state could not perform a condition, according to the terms of the enabling act, which was, by the terms of that act, to be performed by *somebody else*, to-wit: the members of the convention. And hence do we say, that the conditions referred to in the act of February 9th, are the conditions which the state was to perform, and which are the equivalent of the things which were to be shown by the terms of the enabling act to the President before it become his duty to declare the state admitted;—and the declaration under discussion, as we have seen, was not one of those things.

4. But we need not speculate about the meaning of the word "conditions" as it occurs in the act of February 9th. Just what it includes is made very clear by the author of the act himself, and by others who engaged in the debate upon the bill in the United States senate. Senator Wade is the author of the act and introduced it in the senate,

Congressional Globe, part 1, 2nd session, 39th Congress, page 13.

Speaking of what was included within the word "conditions" as used in his act he said:

"The only conditions we imposed upon these people by the enabling act were in these words which I read from that act:

"Said constitution shall provide by an article forever irrevocable without the consent of Congress of the United States:

1st, That slavery or involuntary servitude shall be forever prohibited in this state.

2nd, That perfect toleration of religious sentiment shall be secured. And no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship.

3d, That the people inhabiting said territory do agree and declare that they forever disclaim all right and titled to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States residing within the said State, shall never be taxed higher than the land belonging to the residents thereof; and that no taxes shall be imposed by said State on lands or property therein belonging to or which may hereafter be purchased by the United States."

These are the three conditions that have been for many years imposed upon new states. These conditions have been literally complied with in the constitution now submitted to us."

Congressional Globe, *supra*, page 127—8.

Mr. Sumner, who opposed the bill, understood the conditions imposed to be the same as those stated by Senator Wade.

Congressional Globe, *supra*, page 330.

And not one of the senators who participated in the debate disputed the statements of either Senator Wade or Senator Sumner, or even intimated that there were any other conditions laid by the enabling act.

III. *It was not within the power of Congress to impose any condition on the state without her consent.*

1. The declaration of the second section of the act of February 9th, that the new State of Nebraska was subject to all the conditions and restriction of the enabling act, was made after the declaration that the state had been admitted into the Union. In this first declaration Nebraska has never acquiesced. Nor was it the intention of Congress that she should. The Congress contented itself with the bare declaration, that the state was subject to the conditions of the enabling act. It did not ask the state's consent or acquiescence, and made no provision for obtaining either. It did, however, require the acceptance, by the Legislature of the state, of the conditions of the third section of the act, which conditions it declared to be fundamental, and directed that the territorial governor should convene the legislature together for that purpose. Let it be noted, please, that it was the legislature of the state which Congress directed to be called together. Thus recognizing that Nebraska was then a state. The governor convened the legislature for the purpose named, and for that purpose only. And he had, indeed, no power to convene it for any other purpose whatever. But, nevertheless, when it assembled it declared that it ratified, adopted and accepted the entire act of February 9th. This it clearly had no authority to do. It was convened to ratify the third section, and had no power to go further under the call.

But where or when did this state legislature get its authority to bind the people by its ratification of the conditions of the third section? It was elected

by the people not to make a constitution or organic law, or to consent to fundamental conditions, but to obey the constitution of the state, as that constitution had been adopted by the people at the polls. It had no more power to change the constitution, or consent to a change therein, and bind the people thereby, than would any voluntary organization of men which might have been selected in the state. Congress might as well have required the ratification of its fundamental conditions by the Young Mens Christian Association, if there was such a body in existence in Nebraska at that time. The ratification would have been just as effective to bind the people.

But however that may be, if the conditions of the second section, (we say of the second section, because we are not interested in those of the third,) are binding on the people of this state, they are so without the state's consent. Congress did not ask for it, and the legislature which assumed to give it, did not have the power to do so under the call concerning it.

The conditions are not binding, for it is a fundamental condition, made so by the Declaration of Independence, whose principles the enabling act required should *not* be disregarded in the constitution of the state, that "all governments derive their just powers from the consent of the governed."

On this point we present an extract from the opinion of Judge Mason of the Supreme Court of Nebraska in the case of *Brittle v. The People*, 2 *Nebraska*, 231. He said:

> "The people of the proposed state are to be 'the governed.' The government which is set over them should have their consent and approval, or it does not possess just authority; and the fundamental maxim is violated.

> Again: it is not within the constitutional power of Congress to frame a constitution for the people, and, *nolens volens*, force it on them. The Federal Constitution authorizes it to guarantee a government republican in form to every state. The expression of this one power over the State excludes the exercise of all other powers. It was competent to open the constitution with which Nebraska presented herself asking admission, and see whether it provided a government republican in form. If that constitution did not provide such a government, Congress could refuse admission, or enter into negotiations with the people of the proposed state to secure the necessary amendment. But it could not say to the applicant, 'This instrument requires your judges of the Supreme Court to hold the District Courts: I will change that, and then force you into the Union with the constitution so modified.' That would have been beyond the competency of Congress, because it would have been exacting more than the constitution authorized it to exact. Besides, the provision that 'new States may be admitted by the Congress into this Union' clearly indicates, by the frame of the clause, the authority to admit them upon their application, and not to force them in upon arbitrary terms prescribed by Congress."

Daniel Webster made some observations in his great speech in the Rhode Island case which are also pertinent here:

> "Now, without going into historical details at length, let me state what I understand the American principles to be on which this system arises.
>
> "First and chief: No man makes a question that the people are the source of all political power. * * * * * * * * Why, where else can we look but to the people for political power in a popular government?" (page 222.)

Again:

"Well then, let all admit, what none deny, that the only source of political power in this country is the people." (page 222.)

Again, on same page:

"The people cannot act daily as the people; they must establish a government and invest it with so much of the sovereign power as the case requires, and this sovereign power, being political, and placed in the hands of the government, that government becomes what is popularly called the *state*."

Again, on page 227:

"Another American principle growing out of this, and just as important and well settled as is the truth that the people are the source of power, is, that when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things, or of opinion, the legislative power provides for that ascertainment by an ordinary act of legislation. Has not that been our whole history?"

Again on page 229, and as a summing up of the whole argument which preceded on this point, he declares:

"We see, therefore, from the commencement of the government under which we live, down to this late act of the state of New York, one uniform current of law, of precedent, and of practice, all going to establish the point that changes in government are to be brought about by the will of the people assembled under such legislative provision as may be necessary to ascertain that will truly and authentically." (Works of Daniel Webster, Vol. 6, pages 221 to 229.)

The change then in Nebraska's new constitution could be brought about only by the will of the people, assembled under such legislative provisions as was necessary to ascertain that will, truly, and authentic-

ally, and not, as in the case at bar, through a territorial legislature not authorized by the people to speak for them with respect to such a change.

In view of the foregoing principles we say, that, if, by any construction of the act of February 9th, it could be said that the conditions and restrictions mentioned in the second section thereof were inclusive of the declaration required by the first sentence of the fourth section of the enabling act, the provisions of that section, that is, section 2, of the act of February 9th, not having been consented to by the people of the state, are not binding on the state.

IV. *Even if, by any process of reasoning, it could be said, that the declaration, required by the enabling act of the members of the constitutional convention, was made, or that by the admission of the state under the provisions of the act of February 9th, the state is subject to the effect of the declaration, the same as if it had been made, we deny that the effect is what plaintiff in error claims it to be.*

1. The meaning of the word adopt, most favorable to plaintiff in error, is "To choose for, or take to one's self; make one's own by selection or assent; to take or receive into a new relationship." (Century Dictionary.)

Taking a thing to one's self, or making a thing one's own by selection or assent, or receiving it into a new relationship, does NOT CHANGE its NATURE. It remains precisely the same as it was before the adoption took place. As, for instance: The adoption of a child, or an idea, or a speech, or a custom, does not change the nature of any of these things. It may change its accidentals, its surround-

ings, its relations, but not the thing itself. So by adopting the constitution of the United States, if the people of the state of Nebraska did adopt it, every word and syllable thereof as it existed before the adoption remains precisely the same after the adoption. The authority conferred on the members of the convention was to adopt the constitution, there was no authority to change it, even as to a word. If any change was wrought in it, it must have been done either before or at the time of the adoption, or afterwards. If before or at the time of the adoption, then the instrument adopted was not the constitution of the United States, but another instrument differing from the constitution of the United States to the extent of the changes which had been wrought therein. The members of the convention had no power to make such a change, they were limited to the adoption of the constitution just as it was, just as it had been from the beginning. True, as we have before observed, the relation which the constitution bore prior to the adoption had been changed by the adoption, but not the constitution itself. The adoption did not strike out of the constitution the words, "The Congress of the United States," where they appear, and substitute therefor the words, "the Legislature of the State of Nebraska." Therefore, the provisions thereof which, in terms, forbid the Congress of the United States to do certain things were not, by the adoption, changed so as to forbid the state legislature to do those things. They still continued to be limitations upon Congress. This is equally true of provisions which are not in terms, but in effect, limitations on Congress, as for instance, the fifth and sixth amendments under which plaintiff in error makes his most serious claim. These amendments, long before Ne-

braska's constitutional convention meet, had been adjudged by this court to be limitations not on the states but on Congress, and when they were adopted, they were adopted with that construction.

But even if it should be held that the construction just mentioned was not adopted with the constitution, the same result would follow. For, as we have seen, the adoption did not change a word or a letter of the constitution. It had after the adoption precisely the same words in it, no more, no less, that it had before the adoption. Therefore the meaning, after the adoption, must be the same. The 5th and 6th amendments must be construed in the light of all other provisions of the constitution. And so construing them, this court held that those two amendments were limitations on Congress, that they meant precisely the same as though they in terms limited the Congress, and the Congress only.

2. Nor will it do to say that only those provisions of the constitution which were applicable, or could be made applicable, to the state were adopted. The answer to such a suggestion is, that the enabling act required the adoption of the whole instrument, not a part. It may, indeed, be conceded that if only the fifth and sixth amendments were adopted they, standing by themselves, might support the construction contended for by the plaintiff in error. But more than they were adopted, the entire instrument was adopted, and those two amendments must be considered in connection with the whole instrument.

V. *Assuming that the declaration in question was made by the members of the convention, and that its effect is what plaintiff in error says it is, then we have two constitutions and two governments for the state of Nebraska.*

1. According to plaintiff in error's theory, the moment the members of the convention declared that they had adopted the constitution of the United States, if they did so declare, they formed a constitution for Nebraska and provided a complete scheme of government, legislative, executive and judicial. And, notwithstanding that Congress intended this, it, at the same time, and in the same act, aye, in the same section, as well as in Sec. 1, provided for the making of another constitution for the state, and another state government. This other constitution was not to be binding upon the people until ratified by direct vote thereof, as is provided by the fifth section. It was then the purpose of Congress when providing for the admission of Nebraska, if plaintiff's view is to be taken, that she should have two state constitutions and two state governments, one created for her by the mere declaration of the members of her constitutional convention, and the other by the direct vote of her people. One providing for an executive with certain powers, and the other providing for an executive with different powers from the first. One providing for a legislature with certain powers, and the other providing for another legislature with different powers and limitations. Such an absurdity, we respectfully submit, was never even thought of by Congress, much less intended by it. This objection is not answered by saying that the state constitution could not, in any event, contain anything in conflict with the constitution of the United

States. The conflict we are discussing is not one between the state and federal constitutions, but between one constitution formed by the people, and another created by the members of the convention out of the federal constitution.

2. Another argument to be drawn from the enabling act itself against the plaintiff's contention is, that the first section of the act, as we have had occasion to observe heretofore, authorizes the inhabitants of the territory to "form" for themselves a constitution and state government, which when so formed shall be admitted into the Union "as hereinafter provided." Thus the people were authorized to "form," not to adopt a constitution, and when that had been done the state was to be admitted; the Nebraska constitution was to be one formed; built; shaped; constructed out of the thought of the people, not adopted ready made. The last sentence of the fifth section as we have heretofore remarked, provided that the state should, when certain things were shown to the President, be admitted on an *equal footing* with the original states. And the act of February 9, actually admitting the state, declared that it was "admitted into the Union upon an *equal footing* with the original states in *all respects whatsoever*. How could this be so if its power was limited as contended by plaintiff in error? Such limitations, plaintiff says, were not placed on any other state. Then Nebraska, if plaintiff be right, was not admitted upon an *equal* footing with the original states in *all respects whatsoever*. And the declaration of Congress that it was is, according to plaintiff, wrong. No, the two things are utterly inconsistent, either Nebraska is not limited by the fifth and sixth amendments, or she was not admitted on an equal footing

with the original states. That she was so admitted, Congress has declared. Therefore the limitations of the fifth and sixth amendments do not apply to her.

VI. *Any conditions imposed by Congress upon the state at the time of her admission which, if enforced, would place her upon an unequal footing with the original states in any respect whatsoever are void.*

I. The effect of plaintiff's contention is, that the limitations of the fifth and sixth amendments rest upon the state, and that she can do nothing to escape them; that they are part of her organic law, and that she is without power to change them. It will be remembered in this connection that the first constitution of Nebraska, the one under which she was admitted, had a provision substantially the same as the fifth amendment to the constitution of the United States. But in 1875 the people changed their constitution and added a provision empowering the legislature to provide for holding persons to answer for criminal offenses on information of a public prosecutor, and authorizing it to abolish, limit, change, amend or otherwise regulate the grand jury system.

Plaintiff in error says the people had no power to make this change. Judge Cooley in his work on the Principles of Constitutional Law, p. 77, says on this point:

> "But when a state comes into the Union it is received on an equal footing with the original states, with all their rights and privileges. It must, therefore, have the same power to amend its constitution which is possessed by the other states. And the conditions which shall undertake to limit its power in this regard, must, in a legal sense, be wholly inoperative."

Dr. Von Holst, in his work on Constitutional Law, at page 188, says:

"The equality of the states is a fundamental principle of the constitution. Hence it has been argued that conditions which limited the right of self government, in comparison with the position in constitutional law of the other states, were inadmissable, and that they could not be enforced; because, as soon as the admission has taken place; the state had become complete master of its freedom of action. * * * * But as Congress never *must* admit a state, the imposition of conditions of any sort cannot be hindered, if they be not directly unconstitutional. And if a state promises not to make use of a certain right guaranteed it by the constitution, this is not unconstitutional; it is simply not obligatory from the standpoint of constitutional law. The imposition and adoption of such conditions are to be regarded as a political pact, to the maintenance of which the state is bound by truth and faith, but *not* by constitutional law."

Pollards's Lessee v. Hagen et al., 3 Howard, 212-213.
Starder v. Graham, 10 Howard, 82.
Weber v. Hober, Commissioner, 18 Wall., 57.

VII. *The Congress did not intend, by the declaration required of the members of the convention, to secure to the citizens of Nebraska any important right, when it desired to do that it adopted another method.*

1. Counsel will, we imagine, deny that it was the intention of Congress to have the inhabitants of Nebraska apply to themselves all the provisions of the federal constitution. He will say, no doubt, that only those which secure to the citizen such rights as are secured by the fifth and sixth amendments were to be applied. The answer to that is, that when Congress

desired to have such provisions applied to the people of Nebraska it took another method from the one imagined by plaintiff. In the very same section of the enabling act, and within a few lines of the provision which evoked this discussion, the Congress provided for the application of just such provisions, by requiring them to to be placed in the state constitution, irrevocably, without the consent of Congress; they are:

1. That the constitution shall be republican and not repugnant to the constitution of the United States or the principles of the declaration of independence.

2. That slavery or involuntary servitude shall be forever prohibited in the state.

3. That perfect toleration of religious sentiment shall be secured, etc.

4. That the lands belonging to the citizens of the United States residing without the state shall not be taxed higher than the land belonging to the residents thereof, etc.

If Congress intended to limit the state in any other respect, would it not have placed the limitations in the above act. That it did not do so is, under the rule *expressio unius est exclusio alterius*, conclusive that it did not intend to impose them. Even those provisions which must appear in the constitution, might be revoked by the state with the consent of Congress. But, if counsel's interpretation of the first sentence of the fourth section of the enabling act is correct, no provision was made for revocation or change of the limitation on the state imposed by the fifth and sixth amendments to the federal constitution. Strange it would be indeed that Congress would provide for the revocation of limitations so important and fundamental

as those required by it to be placed in the state constitution, and should not provide for the revocation of the other limitations which counsel say were imposed.

VIII. *What was meant by the provision of the enabling act requiring the members of the Constitutional Convention to adopt the constitution of the United States.*

1. When the enabling act was passed, April 19th, 1864, the nation was in the throes of a civil war. A large part of the people of our common country had denied the binding force of the constitution, and alleged that it was a mere compact between the states, to be broken at will. Hence, when the inhabitants of the territory of Nebraska sought admission to the Union as a state, it was important to know how they stood with respect to the federal constitution. And so the members of the convention were required to show their loyalty to that instrument by adopting it immediately after organizing. By requiring this of them, no more was required than what we have already indicated. They were required to adopt the constitution in the application which it then had, and according to the meaning which it then bore, and had borne from the time of its adoption by the nation. The action required was a pledge of fealty, irrevocable. At no time thereafter could the state say, truthfully, that it was not bound by the constitution of the United States, as certain southern states had said, and that it could withdraw from the Union when it pleased. This is the reason why the Congress did not provide for the revocation of the declaration adopting the constitution, it did not intend that it should be revocable.

In conclusion permit us to suggest that the whole matter, in our judgment, could be disposed of by say-

ing, that whatever the effect of such a declaration on the part of the members of the convention might have been, it was never made, and, hence, the effect does not exist. Neither is it covered by the second section of the act of February 9th, 1867, which declares Nebraska subject to the conditions of the enabling act, for the manifest reason that this was not a condition to be performed by the state, but by the members of the convention. It was on the members the obligation was imposed, and consequently the declaration making Nebraska subject to the conditions imposed on her by the enabling act, would not make her subject to the conditions imposed on the members of the convention.

If our argument be correct, and we think it is, plaintiff in error must serve out his well deserved sentence in the Nebraska penitentiary, and with him hundreds of others for whom the doors of the penitentiary would swing outward, if this case was reversed.

Respectfully submitted,

CONSTANTINE J. SMYTH,

Attorney General.